STATE OF MICHIGAN

COURT OF APPEALS

WILHELMINA KEYSHA TAYLOR-FLOYD, Plaintiff-Appellant,	UNPUBLISHED April 26, 2007
v	No. 274061 Macomb Circuit Court
CONSOLIDATED MANAGEMENT, INC., Defendant-Appellee.	LC No. 2005-004246-NO

Before: Whitbeck, C.J., and Murphy and Cooper, JJ.

PER CURIAM.

Plaintiff Wilhelmina Taylor-Floyd appeals as of right the trial court's order granting defendant Consolidated Management, Inc.'s motion for summary disposition under MCR 2.116(C)(10). We reverse and remand.

I. Basic Facts And Procedural History

Consolidated Management owns and operates an apartment complex known as Riverside Village Apartments in Clinton Township. At approximately 8:00 a.m. on the morning of Friday, February 11, 2005, Taylor-Floyd was walking from her Riverside Village apartment to her car. According to Taylor-Floyd, just as she stepped down to the sidewalk from a porch-like area outside the front entrance of the building, she slipped on "grayish-black" or "black" ice. She explained that the ice "looked clear like it was . . . part of the pavement . . . ." According to Taylor-Floyd, "It just didn't look like anything [was] there when I was looking down going towards my car." However, Taylor-Floyd testified that while she was on the ground, she was able see the "thin sheet of ice" under her. Taylor-Floyd fractured her left ankle during the fall.

Taylor-Floyd filed a complaint in Macomb Circuit Court, alleging that Consolidated Management allowed water to drain from the apartment building onto the sidewalk. Taylor-Floyd claimed that, on numerous occasions before the February 11 incident, she had complained to Consolidated Management about the drainage problem. However, she alleged that Consolidated Management failed to take any remedial action. Taylor-Floyd denied that Consolidated Management's staff applied any salt to the sidewalk in front of her apartment before 8:00 a.m. on the day when she allegedly fell. Citing MCL 554.139, Clinton Township Ordinance § 1022.33, the standards of the Building Officials & Code Administrators International, Inc. (BOCA), and the International Property Maintenance Code, Taylor-Floyd alleged that Consolidated Management negligently breached its duty to keep and maintain the

premises in a safe condition. Taylor-Floyd denied that she was liable under a contributory negligence theory. Taylor-Floyd asserted that an "open and obvious" defense was precluded by Consolidated Management's statutory duties. Taylor-Floyd also countered a potential open and obvious defense by asserting that the ice was not noticeable on casual inspection, the sidewalk was effectively unavoidable, and special aspects rendered the sidewalk highly dangerous.

Consolidated Management moved for summary disposition under MCR 2.116(C)(10), arguing that it owed no duty to Taylor-Floyd, either under common law, or by statute or ordinance. Consolidated Management also argued that it was not liable for Taylor-Floyd's injury sustained after falling on an open and obvious condition of the premises. With respect to its open and obvious defense, Consolidated Management pointed out that pictures of the scene taken by Taylor-Floyd's husband immediately after the accident clearly showed the visible nature of the ice, along with snow-covered grass. Accordingly, Consolidated Management argued that there were no special aspects of the condition that rendered it unreasonably dangerous. Consolidated Management also pointed out that Taylor-Floyd could have exited the building through any one of three doors: the common front entrance, the common rear entrance, or the private sliding door off Taylor-Floyd's apartment unit.

After hearing oral arguments on the motion, the trial court found that the testimony and photographic evidence made it clear that the ice on which Taylor-Floyd slipped was open and obvious. Further, relying on *Teufel v Watkins*, in which this Court stated that the accumulation of snow and ice is not a defect in the premises,[1] the trial court further ruled that MCL 554.139 did not create a statutory duty to remove snow and ice. Accordingly, the trial court granted Consolidated Management's motion for summary disposition under MCR 2.116(C)(10). Taylor-Floyd now appeals.

II. Motion For Summary Disposition

A. Standard Of Review

Under MCR 2.116(C)(10), a party may move for dismissal of a claim on the ground that there is no genuine issue with respect to any material fact and that the moving party is entitled to judgment as a matter of law. The moving party must specifically identify the undisputed factual issues and support its position with documentary evidence.[2] The trial court must consider all the documentary evidence in the light most favorable to the nonmoving party.[3] We review de novo the trial court's ruling on a motion for summary disposition under MCR 2.116(C)(10).[4] The proper interpretation of a statute is a question of law subject to de novo review.[5]

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[1] *Teufel v Watkins*, 267 Mich App 425, 429 n 1; 705 NW2d 164 (2005).

[2] MCR 2.116(G)(3)(b); *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999).

[3] MCR 2.116(G)(4); *Maiden*, *supra* at 120.

[4] *O'Donnell v Garasic*, 259 Mich App 569, 572; 676 NW2d 213 (2003).

[5] *Putkamer v Transamerica Ins Corp of America*, 454 Mich 626, 631; 563 NW2d 683 (1997).

B. Landlord's Duty in Premises Liability

To establish a prima facie case of negligence in a premises liability action, a plaintiff must prove four elements: (1) a duty owed by the defendant to the plaintiff; (2) a breach of that duty; (3) causation; and (4) damages.[6] A landowner's duty to another person who is on the land depends on the latter person's status.[7] A tenant is an invitee of the landlord.[8] Generally, a landlord owes a duty to invitees to exercise reasonable care to protect the invitee from an unreasonable risk of harm caused by a dangerous condition on the land.[9] This duty does not extend, however, to a danger so open and obvious that the invitee can be expected to discover it upon casual inspection.[10]

Generally, the hazard presented by snow and ice is open and obvious.[11] But the fact that a danger is open and obvious will not excuse a statutory duty.[12] In *O'Donnell v Garasic*, this Court held:

> The open and obvious danger doctrine is not available to deny liability to an injured invitee or licensee on leased or licensed residential premises when such premises present a material breach of the specific statutory duty imposed on owners of residential properties to maintain their premises in reasonable repair and in accordance with the health and safety laws, as provided in MCL 554.139(1)(a) and (b).[13]

Under MCL 554.139(1)(a), a landlord owes a duty to maintain the premises and all common areas fit for their intended use. Under MCL 554.139(1)(b), a landlord owes a duty to keep the premises in reasonable repair and to comply with applicable health and safety laws of the state and local government.

Although *O'Donnell* involved a claim of a defective condition on an indoor staircase,[14] this Court recently extended the *O'Donnell* holding to a case where a tenant slipped and fell on an icy sidewalk as he was walking from his apartment to the parking lot.[15] In *Benton v Dart*

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[6] *Henry v Dow Chemical Co*, 473 Mich 63, 71-72; 701 NW2d 684 (2005).

[7] *O'Donnell*, *supra* at 573.

[8] *Benton v Dart Properties, Inc*, 270 Mich App 437, 440; 715 NW2d 335 (2006); *O'Donnell*, *supra* at 573.

[9] *Lugo v Ameritech Corp*, 464 Mich 512, 516; 629 NW2d 384 (2001); *O'Donnell*, *supra* at 573.

[10] *Lugo*, *supra* at 516; *O'Donnell*, *supra* at 574.

[11] *Teufel*, *supra* at 428. Given our conclusion based on application of the landlord's statutory duty, we need not address in this case whether "black ice" is an open and obvious condition.

[12] *O'Donnell*, *supra* at 570, 580-582.

[13] *Id.* at 581.

[14] *Id.* at 571-572.

[15] *Benton*, *supra* at 438.

Properties, Inc., this Court stated, "In light of *O'Donnell*, if defendant breached its duties under MCL 554.139, defendant would be liable to plaintiff even if the ice on the sidewalk was open and obvious."[16] Construing the plain language of subsection 1(a), the *Benton* Court first concluded that outdoor sidewalks located within the parameters of an apartment complex constitute "common areas."[17] Having so concluded, the *Benton* Court then explained that a landlord has a statutory duty to take reasonable measures to ensure that the sidewalks are "fit for their intended use."[18] Finally, applying the statute to the presence of ice on an apartment complex sidewalk, this Court found that "[b]ecause the intended use of a sidewalk is walking on it, a sidewalk covered with ice is not fit for this purpose."[19] In so holding, this Court acknowledged that, while inviters have no general duty to remove snow and ice, the Legislature has imposed a "higher duty on landlords . . . given the enhanced rights afforded tenants . . . and the tenants' reliance on interior sidewalks to access their homes and parking structures."[20] Ultimately, this Court concluded that, because, based on the evidence, reasonable minds could differ regarding whether the landlord's salting efforts constituted the exercise of reasonable care, the tenant established a genuine issue of material fact regarding whether the landlord breached its duty under MCL 554.139(1)(a) to maintain the sidewalk in a manner that was fit for its intended use.[21]

Here, Taylor-Floyd slipped and fell on a sidewalk that was located within the parameters of the Riverside Village apartment complex. Thus, under *Benton*, Consolidated Management had a statutory duty to take reasonable measures to ensure that the sidewalk, as a common area, was fit for its intended use of walking; that is, Consolidated Management had a statutory duty to take reasonable preventative measures to remove ice accumulations from the sidewalk, regardless of the open or obvious nature of the icy sidewalk.

We next address whether Taylor-Floyd has created a genuine issue of material fact regarding whether Consolidated Management breached its statutory duty under MCL 554.139(1)(a). The building manager's "snow log" for February 11, 2005, described the weather as "sunny," with a temperature of 25 degrees and no snowfall. The log stated that, at 8:00 a.m. that morning, the walks were salted, using 15 bags of salt. The log also stated that 20 bags of salt had been used to salt the walks the previous morning. But, according to Taylor-Floyd, although it had snowed two days before the day she fell, the last time she had seen anyone salting the area where she fell was about a week before the accident. Taylor-Floyd further testified that she did not see any evidence of salt or any other ice-melting granules in the area where she fell. Therefore, we conclude that Taylor-Floyd has established a genuine issue of

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[16] *Id.* at 441.

[17] *Id.* at 442-443.

[18] *Id.* at 444; MCL 554.139(1)(a).

[19] *Id.* at 444.

[20] *Id.* at 443 n 2, citing *Mann v Shusteric Enterprises, Inc*, 470 Mich 320, 332-333; 683 NW2d 573 (2004).

[21] *Id.* at 444.

material fact regarding whether Consolidated Management breached its duty under MCL 554.139(1)(a) to maintain the sidewalk in a manner that was fit for its intended use.

Consolidated Management argues that our disposition in this case should be dictated by *Teufel v Watkins*. In *Teufel*, a tenant slipped and fell on ice in the parking lot of his apartment complex, and this Court upheld the lower court's order granting summary disposition to the landlord based on the defense of open and obvious.[22] In a footnote, this Court acknowledged the plaintiff's argument "that the trial court erred when it failed to address . . . that [the landlord] had a statutory duty under MCL 554.139 to keep its premises and common areas in reasonable repair and fit for their intended uses."[23] But this Court dismissed the argument as harmless error on the ground that, although MCL 554.139(1)(b) requires repair of a defect in the premises, "[a]ccumulation of snow and ice is not a defect in the premises."[24]

In November 2006, this Court released a published opinion, *Allison v AEW Capital Mgt, LLP* (*Allison I*), in which it followed the *Teufel* footnote but declared a conflict with that case under MCR 7.215(J)(2).[25] In *Allison I*, this Court explained that the analysis of the *Teufel* footnote was deficient for two reasons.[26] The first reason was *Teufel*'s failure to mention the *O'Donnell* decision.[27] The second reason was *Teufel*'s failure to analyze subsection 1(a), which requires that common areas be fit for their intended uses, separately from subsection 1(b), which differently requires that premises be kept in reasonable repair.[28] *Allison I* indicated that absent the *Teufel* footnote, it would follow the rule in *Benton*.[29]

One month after *Allison I*, this Court issued an order declining *Allison I*'s request for a conflict panel.[30] But after granting reconsideration and vacating *Allison I*,[31] this Court issued a new decision, this time following the *Benton* holding. *Allison II* concluded that it was not bound to follow the *Teufel* footnote because "[h]ad our Court in *Teufel* intended to create a rule of law

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[22] *Teufel*, *supra* at 426, 428.

[23] *Id.* at 429 n 1.

[24] *Id.*

[25] *Allison v AEW Capital Mgt, LLP* (*Allison I*), ___ Mich App ___; ___ NW2d ___ (Docket No. 269021, issued Nov. 28, 2006), slip op p 2, vacated by *Allison v AEW Capital Mgt, LLP* (*On Reconsideration*) (*Allison II*), ___ Mich App ___; ___ NW2d ___ (Docket No. 269021, issued March 15, 2007).

[26] *Allison I*, *supra* at slip op p 2.

[27] *Id.*

[28] *Id.* at slip op pp 2-3.

[29] *Id.* at slip op p 3.

[30] *Allison v AEW Capital Mgt, LLP*, unpublished order of the Court of Appeals, entered December 21, 2006 (Docket No. 269021).

[31] *Allison v AEW Capital Mgt, LLP*, unpublished order of the Court of Appeals, entered January 19, 2007 (Docket No. 269021).

regarding the availability of the open and obvious danger doctrine when a landlord has a statutory duty under MCL 554.139(1)(a) and (b), it would have done so in the body of the opinion rather than in a footnote."[32] Accordingly, following *Benton*, this Court in *Allison II* held that a landlord has a duty to keep a parking lot, like a sidewalk, fit for its intended use and, therefore, free from ice.[33]

We are bound by MCR 7.215(J)(1) to follow this Court's published opinions in *Allison II* and *Benton* and to hold that a landlord is precluded from asserting an open and obvious defense to escape its statutory duty under MCR 554.139(1)(a). That duty is to maintain its premises and common areas fit for their intended use by taking reasonable measures to remove snow and ice.

We further note that we agree with Consolidated Management that a landlord is not required to *eradicate* the presence of ice and snow on its property because, otherwise, a landlord would become an insurer of its tenant's safety, which, the Michigan Supreme Court has made clear, is not the intended result of the landlord's duty.[34] But, as stated above, a landlord is statutorily bound to take *reasonable* preventative measures to *remove* ice accumulations from the sidewalk. And, as concluded above, whether Consolidated Management took such reasonable measures in this case is a question for a finder of fact.[35] Moreover, we emphasize that the rationale behind our holding in this case differs from other snow and ice premises liability cases because, while inviters have no general duty to remove snow and ice, the Legislature has imposed a "higher duty on landlords . . . given the enhanced rights afforded tenants . . . and the tenants' reliance on interior sidewalks to access their homes and parking structures."[36]

Additionally, we note that Taylor-Floyd argues violation of the BOCA building code, presumably referring to the air conditioning unit drainage system that allegedly caused the accumulation of ice to form on the sidewalk in front of Taylor-Floyd's apartment building. As in *O'Donnell*,[37] because Taylor-Floyd has not established any BOCA violations in the record, we charge the trial court on remand with the responsibility of addressing the alleged violations as

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[32] *Allison II*, *supra* at slip op p 4, citing *Guerra v Garratt*, 222 Mich App 285, 289-292; 564 NW2d 121 (1997) (holding that a footnote in the Michigan Supreme Court's opinion in *Lemmerman v Fealk*, 449 Mich 56; 534 NW2d 695 (1995), did not create an exception to the general holding of *Lemmerman* because the Supreme Court would have written such an exception into the text of the opinion and not merely in a footnote).

[33] *Allison II*, *supra* at slip op p 4.

[34] See *Lugo*, *supra* at 517.

[35] See *Benton*, *supra* at 444-445.

[36] *Benton*, *supra* at 443 n 2, citing *Mann*, *supra* at 332-333.

[37] *O'Donnell*, *supra* at 578-579.

part of its negligence analysis. We similarly instruct the trial court to address Taylor-Floyd's allegations of violations of Clinton Township Ordinance § 1022.03.[38]

We reverse and remand for further proceedings. We do not retain jurisdiction.

/s/ William C. Whitbeck
/s/ William B. Murphy
/s/ Jessica R. Cooper

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[38] Clinton Township Ordinance 1022.03 states, in pertinent part, as follows:

> It shall be the duty of every owner of land within the Charter Township of Clinton to keep and maintain the sidewalk located upon the public right-of-way contiguous to such owner's property, or any other sidewalk located on such property of the owner that may be open to the public, in the following manner:
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> * * *
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> (c) Free and clear from accumulations of snow, sleet, ice and water.

See *Johnson v Bobbie's Party Store*, 189 Mich App 652, 661; 473 NW2d 796 (1991) (stating that a violation of an ordinance is evidence of negligence).